841.102. A case manager may authorize a petition to the court for release at any time. *Id.* § 841.121. If an individual files a petition for release without the approval of the case manager, the judge shall review the petition. However, if the individual brings successive unauthorized petitions, the judge may deny them without a hearing. *Id.* § 841.123.

2. Petitioner suffers from paranoid schizophrenia, antisocial personality disorder, and mild mental retardation. He has been hospitalized for psychiatric problems on several occasions.

Petitioner pleaded guilty to two counts of second-degree sexual assault in 1987 and was sentenced to two years' incarceration. Petitioner pleaded guilty to one count of first-degree aggravated sexual assault while on parole and received a ten-year sentence. His parole for that conviction was revoked twice, in 1996 and 1999.

Commitment proceedings were brought against him in October 2000. Before trial, Petitioner moved for a continuance alleging he was unable to consult with counsel due to his mental state. Petitioner testified that he did not want counsel's assistance and refused to allow counsel to talk to his mother. The trial court denied the motion. Petitioner also submitted a motion for a competency hearing. The court permitted an offer of proof allowing Petitioner to present the testimony of a psychologist and a psychiatrist. They testified that Petitioner was incompetent, unable to understand the proceedings, and unable to assist counsel. Pet. App. 40-41. The state, through the Prison Prosecution Unit, offered no controverting evidence. The court denied the motion.

At trial, the state called Petitioner to the stand and questioned him about his prior convictions and a prior charge for which he was not convicted.

The jury found Petitioner to be a sexually violent predator. The trial court entered judgment and issued an Order of Commitment, including a requirement that Petitioner abide by all conditions of treatment as provided in the Civil Commitment Requirements. Pet. App. 80.

3. Petitioner appealed, claiming the statute was punitive, both facially and as applied. In addition, Petitioner argued that his due process right to stand trial while competent, his due process right to consult with counsel, and his Fifth Amendment right against self-incrimination were violated. The Thirteenth Court of Appeals agreed and reversed and remanded Petitioner's commitment. They found that Petitioner was mentally incompetent and could not be held to the "contract" of commitment. The court also found Petitioner's right to counsel, as provided by the statute, must include his right to a meaningful opportunity to be heard. The court held several aspects of the commitment scheme were punitive in nature, and that the statute itself was punitive. *See* Pet. App. 38-78.

4. Respondent appealed to the Texas Supreme Court. The Prison Prosecution Unit appeared as an amicus curiae. The Court based its analysis on the United States Constitution. The Court found that the legislature created the statute with an "unquestionably" civil intent. Pet. App. 18. In its analysis of the statute's purposes and effects, the Court found that the statute "imposes no physical restraint," but did "impose[] affirmative disabilities." Pet. App. 19. However, the Court found that "this factor alone does not compel a conclusion that the statute is punitive."

Pet. App. 20. The Court then found the historical view of commitment weighed against a punitive finding. *Id.*

The Court found the statute was not retributive, had no scienter requirement, and that its function as a deterrent was an "incidental" effect. Pet. App. 21-23. The Court did not consider whether there was an alternative purpose to which the act may be rationally connected, but instead determined whether there was a rational connection to a nonpunitive purpose. Pet. App. 25. The Court failed to consider whether the statute served an alternative purpose besides treatment or supervision. The Court also found that the Act was not excessive even though it contained "punitive aspects." Pet. App. 30.

Because the Court found the Texas SVP Act to be civil, it found that Petitioner was not entitled to a competency determination. Pet. App. 31. In addition, the Court found no merit to Petitioner's claim that his compelled testimony violated the Fifth Amendment. Pet. App. 33.

This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To Review The Texas Supreme Court's Holding That The Texas Civil Commitment of Sexually Violent Predators Statute Is Civil And Comports With Due Process

A. The Texas Supreme Court's analysis in this case conflicts with this Court's rulings in *Kansas v. Hendricks* and *Kansas v. Crane*.

The Texas Civil Commitment of Sexually Violent Predators Statute (hereinafter Texas SVP Act) is much

more punitive than what is constitutionally permissible for a civil law. Though it is labeled a "civil" program aimed towards treatment, the Texas SVP Act is actually a quick, cheap way for Texas to send sex offenders to prison, a "mechanism for retribution or general deterrence." *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 372-73 (1997) (Kennedy, J., concurring)). To uphold the Texas SVP Act, the Texas Supreme Court overextended this Court's rulings in *Hendricks* and *Crane*, ignoring the guidelines for constitutional analysis set forth in those cases. The Texas SVP Act crafts post-sentence punishment for sex offenders that contradicts the stated legislative purpose, revealing the statute to be a "sham or mere pretext" to re-incarcerate sex offenders under the guise of civil commitment. *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring).

The Texas SVP Act is markedly different from the SVP civil commitment statutes previously reviewed by this Court. Explicitly denying any form of treatment in a mental health facility, the Texas SVP Act employs only outpatient treatment, even though persons subject to the statute may be so mentally ill as to be a danger to themselves or others. It contains criminal penalties for violation of any one of over 100 rules and restrictions, making possible a sentence of life in prison for the most minor technical violations. It requires only biennial review after commitment order, and empowers the trial judge to summarily dismiss petitions for release filed by the committed person. It does not require a probable cause hearing before a commitment proceeding. It adds the requirement of a "predatory act" finding, injecting an element of intent, or scienter, into its "sexually violent predator" definition.

Finally, it requires that all commitment proceedings take place in a single county (out of 254 Texas counties), bringing all actions before the same courts, judges, and juries. These provisions do not serve the stated purposes of the statute. *See generally*, Pet. App. 102-133. Instead, when viewed in the aggregate, the Texas SVP Act creates a low-cost, low-hassle funnel to return sex offenders to prison. The actual legislative purpose of the Act is to inflict punishment.

These punitive aspects of the Texas SVP Act distinguish it from other statutes this Court has found to be civil. This Court's extensive civil commitment jurisprudence has never found these novel and extreme measures to be "civil" in nature. The Texas Supreme Court upheld the Texas SVP Act only through a careless interpretation of *Kansas v. Hendricks*.

In *Hendricks*, this Court considered the relevant provisions of the Kansas statute both individually and in the aggregate to determine whether the statute was punitive. The ruling specifically limited itself to the facts present in *Hendricks*. Upon revisiting the Kansas statue in *Crane*, the Court found that *Hendricks* did not create a "precise constitutional standard" and that the murky waters of civil commitment and mental illness "are not always best enforced through precise bright-line rules." *Crane*, 534 U.S. at 413. The Texas Supreme Court, however, misread *Hendricks* as an unlimited endorsement of civil commitment in any form, violating both *Hendricks* and *Crane*.

In approving the Texas SVP Act, the Texas Supreme Court did not seriously consider the material differences between the Texas law and the Kansas law at issue in

Hendricks. Either the Texas Supreme Court found no difference between the Texas and Kansas statutes when there were fundamental differences, or the Court recited *Hendricks*, taking no account of the facts of Petitioner's case or the rigorous analysis required by this Court. The Texas Supreme Court has therefore misinterpreted *Hendricks* and *Crane*. Accordingly, the Texas Supreme Court's erroneous conclusions place significant federal constitutional rights of a class of citizens in peril.

1. Punitive or Civil

While this Court has "consistently upheld" civil commitment statutes, it has done so recognizing that the curtailment of individual liberty interests inherent in civil commitment makes the implementation of new, more punitive commitment schemes an ongoing danger. *Hendricks*, 521 U.S. at 357, 373 (2002) (Kennedy, J., concurring). The Court uses a two-pronged inquiry to determine whether a statute is criminal or civil. The first step of the analysis is to "determine whether [the legislature], in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248 (1980). If the legislature shows a civil intention, the Court "inquire[s] further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 249.

a. Legislative Intent

The Texas Legislature called the statute "Civil Commitment of Sexually Violent Predators." Notwithstanding

its name, the SVP Act incorporates numerous criminal features, calling into question the true legislative intent.

Civil commitment statutes are often found by the Court to be civil. However, this Court has found "that a 'civil label is not always dispositive,' *Allen v. Illinois*, 478 U.S. 364, 369 (1986); it has said that in close cases the label is 'not of paramount importance,' *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 (1994); and it has looked behind a 'civil' label fairly often. E.g., *United States v. Halper*, 490 U.S. 435, 447 (1989)." *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting) (citations amended).

The location of a statute within the law may have some bearing on the intent of the legislature. *See Smith v. Doe*, 538 U.S. 84, 94-95 (2003); *Hendricks*, 521 U.S. at 359. The Texas SVP Act was placed in the Health & Safety Code, which contains both civil and criminal provisions, including controlled substance offenses, hazardous substance offenses, and penalties for disabling fire exit alarms. TEX. HEALTH & SAFETY CODE chs. 481, 482, 483, 485, 501, 793.

As others before them have done, the Texas legislature chose to call the Act "civil." But it also made a violation of commitment a felony offense. TEX. HEALTH & SAFETY CODE § 841.085. The Texas SVP Act uses the Texas Prison Prosecution Unit to prosecute commitment cases, and assigns State Counsel for Offenders to defend them. *Id.* §§ 841.004-005. Both of these entities otherwise prosecute or defend criminal cases. Additionally, the statute provides that the Prison Prosecution Unit initiate these cases while offenders are still incarcerated. *Id.* § 841.021. The Multidisciplinary Team that reviews the cases of alleged sexually violent predators includes two persons

from the Texas Department of Criminal Justice (TDCJ). *Id.* § 841.022(a)(2). TDCJ makes the initial assessment of whether an incarcerated individual is a sexually violent predator. *Id.* § 841.023. The burden of proof at all commitment proceedings is beyond a reasonable doubt. *Id.* § 841.062. Once committed, an offender may be monitored with polygraphs or plethysmographs. *Id.* § 841.083. TDCJ provides housing for committed individuals. *Id.* The selection of jurors is governed by criminal procedural rules. *Id.* § 841.146. In *Smith v. Doe*, this Court allowed a civil provision to "invoke" the criminal process, but the Texas SVP Act does not merely invoke criminal procedures, they are inextricably intertwined with the commitment process. 538 U.S. at 95. While criminal provisions or procedures may sometimes enforce civil regulations, the Texas SVP Act's excessive reliance on them makes the statute's character less clear. Because the legislature's intent is unclear, the analytical framework requires an assessment of the effects of the statute in the next step in the analysis.

b. Statutory Scheme

The intent of the legislature is not singularly determinative of whether a statute is civil in nature. "Where congress has indicated an intention to establish a civil penalty, [the Court has] inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Ward*, 448 U.S. at 248-49. In the course of this determination, the Court regularly uses the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962) as "useful guideposts." *United States v. Hudson*, 522 U.S. 93, 99 (1997). The Texas Supreme Court discussed these factors in their determination but

gave them neither the weight nor the consideration necessary. *See* Pet. App. 1-37.

The *Mendoza-Martinez* factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

372 U.S. at 168-69 (1962). As stated in *Ward*, either the purpose of the statute or its actual effects can negate stated intentions to establish a civil penalty. 448 U.S. at 248-49. Although a law may have an explicitly stated purpose, as the Texas SVP Act does, a statute's "purpose must be determined by its natural and reasonable effect." *Henderson v. Mayor of New York*, 92 U.S. 259, 268 (1876). Examination of the statute should include its text, but should be "guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94 (1993).

Review of sex offender commitment statutes requires that a court look to *Hendricks* for guidance. A proper *Hendricks* analysis applies the standards adopted by this Court to the particular statute being considered. Texas and Kansas approach commitment differently. Kansas confines to a secure facility and Texas releases into the

community. These critical differences require an analysis of the Texas statute, using *Hendricks* as a model for analysis rather than a rubber stamp for approval.

The Texas Supreme Court ignored two major elements of the Texas SVP Act that show the Act is punitive: subjection to strong criminal penalties for violation of an exacting "contract," and mistreatment of the mentally ill.

i. Criminal Penalties

The Texas SVP Act has punitive and retributive criminal penalties. It begins and ends with criminal activity. Pet. App. 59.

Past criminal conduct is required for eligibility as a Sexually Violent Predator (SVP) under the Texas Statute. TEX. HEALTH & SAFETY CODE § 841.003(b). The Texas SVP Act's definition of a "sexually violent predator" requires that a person be a "repeat sexually violent offender." Upon commitment, the code specifies ten standard requirements for committed individuals to follow, but the judge may "impose on the person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community." *Id.* § 841.082(a)(9). In this case, the trial judge appended 97 conditions to which Petitioner must adhere. Pet. App. 88-101. Violation of any condition imposed by the judge results in the prosecution of a third-degree felony and potential incarceration for two to ten years. *Id.* § 841.085; TEX. PEN. CODE § 12.34. Because offenders are required by the statute to have two prior felony charges, those with more than one conviction who violate a term of their "contract" may be enhanced to face first-degree felony sentences ranging from twenty-five

to ninety-nine years, or life. TEX. PEN. CODE § 12.42(d). As the Thirteenth Court of Appeals noted, Fisher could face a *life sentence* for use of a post office box or for rendering aid to someone stranded on the road. Pet. App. 57.

The potential for re-incarceration is extremely high and is more than mere speculation. In a 2003 study of the Texas SVP commitment program, ten of 17 offenders who had been placed in the program were re-incarcerated for violations of commitment, such as leaving home without permission.[1] None of the ten were incarcerated for offenses that were sexual or otherwise criminal in nature.[2]

Individuals who are civilly committed to inpatient treatment in a handful of other states face minor criminal consequences for already-illegal behavior, but none are subject to such severe felony penalties for the equivalent of a technical violation of probation or parole.[3] The situation most analogous to the Texas SVP Act is an extraordinarily strict probation regime with outsized punishment for "technical" violations. There is no doubt that Texas law considers probation (or community supervision) to be punishment. *See generally*, TEX. CODE CRIM. PROC. Art. 42.12. Undoubtedly, civilly committed individuals are placed in a unique class exclusive to Texas. They are

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[1] Walter J. Meyer, III, et al., *Outpatient Civil Commitment in Texas for Management and Treatment of Sexually Violent Predators: A Preliminary Report*, 47 Int'l. J. of Offender Therapy & Comp. Criminology 396, 403 (2003).

[2] *Id.* at 404.

[3] FLA. STAT. ANN. § 394.927 (second degree felony for escape); IOWA CODE § 229A.5B (simple misdemeanor for escape from a secure facility); VA. CODE ANN. § 37.1-70.18 (class 6 felony for escape).

peculiarly subject to severe sentencing for "crimes" that apply only to them.

The Texas Supreme Court did not give any weight to these issues in its consideration of Petitioner's case. After briefly reviewing the criminal aspect of the Texas statutory scheme, the Texas Supreme Court decided "the freedom from confinement outweighs the criminal sanction imposed for a failure to obey the commitment conditions." Pet. App. 29. It is true that the civilly committed sex offender in Texas is not confined to a psychiatric inpatient setting. Instead, civilly committed sex offenders are released to close supervision and, purportedly, outpatient treatment. But the true nature of the "freedom" they enjoy is detailed by the Treatment and Supervision Contract ordered by the trial court.

The Contract establishes 97 additional requirements and restrictions. Pet. App. 88-101. For example, as a result of the contract, a committed sex offender may not be "in an area where children are," may not have contact with family members without approval, may not "sit and watch people," may not go to "schools, parks, swimming pools, movie theaters, public libraries, amusement parks, arcades or malls," must abide by a dress code, may not buy or use any recording equipment, may not operate a car without approval, must be on time for all appointments, must wear an electronic tracking device, must have full-time employment, must have a written assignment for all group therapy sessions, and must comply with "any individual rules Treatment Staffs develop[.]" Pet. App. 97. The requirements imposed upon Petitioner are not those individually "determined necessary by the judge" TEX. HEALTH & SAFETY CODE § 841.082(a)(9), but instead come

directly from the Client Handbook for the State of Texas Sexually Violent Predator Program.

So, for example, even though Petitioner was not diagnosed as a pedophile and committed no offenses against family members, any contact with family members is forbidden, unless approved by his case manager. Also, although he has no history of pedophilia, he is restricted from being in any place where he may be in proximity to children and is thus subject to conditions more applicable to a pedophile. These conditions are not those envisioned as "necessary" by the Act and have severe punitive consequences.

The Texas Legislature's intent to incarcerate and punish is barely disguised by the veil of kinder, gentler outpatient treatment. The terms of the commitment order could be difficult for even the most intelligent and disciplined person to uphold. The Texas SVP Act purports to integrate committed offenders back into society but effectively disallows any presence or participation in society. There is virtually no public place where the committed offender may be present without violating the terms of his commitment order and subjecting himself to the possibility of life in prison. This is not consistent with the intention to treat or supervise, but is a "sham or mere pretext" to incarcerate sex offenders under the guise of civil commitment. *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring).

The Texas Supreme Court's view – that this "freedom from confinement" compensates for the potential criminal penalties – contradicts the true effect of the statute. To compare the two statutes, the Kansas statute places an offender in a room and locks the door. The Texas statute

closes an unlocked door, but threatens life in prison if it is opened. Because the committed offender still may not open the door, the Texas statute does not create any more freedom from confinement, and adds consequences never considered by the Kansas statute. The two do not cancel each other out as simply as the Texas Supreme Court held.

Reviewing the Texas SVP Act, it is hard to ignore the punitive nature of the law and the impact of this on several of the *Mendoza-Martinez* factors, especially affirmative disability or restraint, retribution and deterrence, an alternative purpose, and excessiveness in relation to that purpose.

The Texas law creates significant disabilities and restraints. The provisions of the commitment order and contract prevent the offender from exercising his own agency within society, infringing on his personal liberty. Subjecting Petitioner to excessive criminal penalties for violations of these conditions is a further restraint. The slightest exercise of will or preference may remove a committed individual from society for the rest of his life.

The criminal effects of the statute are retributive and deterrent in nature and do not support any alternative purpose. Such extreme penalties for such small deviations do not enforce treatment or supervision. These harsh penalties serve only as an additional way to punish individuals who have discharged their penal sentences for their past offenses, or who never had to shoulder criminal liability for criminal conduct. In the process, the penalties place the offender back in a prison setting. Although other states have outpatient programs and allow for the revocation or modification of the offender's treatment program, the most severe penalty for any violation is continued

commitment in a secure facility for mental treatment.[4] In the alternative, those states simply allow courts to amend the treatment program to better serve the offender's needs. Even those states with criminal penalties for offenses of escape from a secure facility or failure to appear when required attach only misdemeanor or low-grade felony sanctions. None comes close to the comprehensive and punitive approach taken by Texas.

SVP Commitment in Texas involves not only commitment, but the strong likelihood of future incarceration. The severe criminal penalties of the Texas SVP Act should have been considered by the Texas Supreme Court in its analysis of the Act. This Court should determine whether it believes these onerous penalties are punitive.

ii. Mental Health

The stated purpose of the Texas SVP Act – to administer "treatment" – is disingenuous. Under the statute, offenders with severe mental disabilities are committed to a program where they cannot receive the treatment they need and, through no fault of their own, cannot comply with the terms of commitment. Further, the Act explicitly disallows treatment in any mental health facility. Those with severe mental or behavioral disabilities are destined to return to prison solely due to their disabilities.

The Texas SVP Act necessarily involves individuals with a "behavioral abnormality." TEX. HEALTH & SAFETY CODE § 841.003. The term is defined as a condition that "affect[s] a person's emotional or volitional capacity." *Id.* § 841.002.

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[4] ARIZ. REV. STAT. § 36-3713; IOWA CODE § 229A.8B.

This abnormality often affects either the mental health or capacity for impulse control of an individual. The Texas SVP Act also necessarily ensnares offenders who were found insane by a court of law. *Id.* § 841.003(b)(1)(C). The Texas statute is directed specifically at these individuals and claims that their treatment is one of its primary purposes. *Id.* § 841.001. However, the natural and reasonable effect of the statute denies available treatment to those with severe disabilities.

The Texas SVP Act specifically states, "[T]he treatment modalities for sexually violent predators are different from the traditional treatment modalities." *Id.* Traditional inpatient mental health care modalities might not work for some persons eligible for SVP commitment. The Texas SVP Act creates treatment for these offenders. Yet the statute also states, "The committed person may not be housed for any period of time in a mental health facility[.]" *Id.* § 841.083(d). Thus, those committed under the Texas SVP Act may only be treated through outpatient treatment, with no alternative. Treatment in a mental health facility would place an individual in violation of their commitment and subject them to the Act's criminal penalties. Even worse, the statute makes those adjudged insane by a court of law eligible for SVP Commitment. Because extreme mental illness or mental retardation may require treatment in a mental facility, SVP commitment necessarily denies the very treatment it purports to provide.

The problem the Texas SVP Act creates for those with extreme mental disabilities goes beyond their access to treatment. The Texas SVP Act demands rigorous compliance with the terms of the contract from all, including those like Petitioner who are afflicted with severe mental

illness or retardation. Prior to trial, Petitioner presented uncontroverted testimony from mental health experts that he had no understanding of the civil commitment proceedings, could not participate in any treatment, and would undoubtedly violate the terms of commitment. Based on this testimony, sex offender treatment is not possible for Petitioner in his current mental condition. Based on the statute's prohibition on mental facilities, no treatment within the SVP commitment regime is possible for Petitioner's mental condition. Placing mentally ill offenders in commitment serves neither the committed individual's needs nor the needs of the state.

Since the Texas SVP Act places those who may be a danger to themselves or others in a treatment program they are not able to comply with due to behavioral or mental instability, it thus becomes obvious that the Act places the mentally and behaviorally impaired in a situation where they are certain to fail no matter how hard they try. Failure, for a committed sexually violent predator, means prison, possibly for life. Release from the SVP commitment program is available only upon a showing that the offender is no longer likely to engage in predatory acts of sexual violence. Offenders with mental disabilities may never be able to make this showing without appropriate mental treatment.

Denying mental health care for committed individuals does not serve the Act's stated purposes of treatment or supervision.

This Court has found several civil commitment statutes to be constitutional, but has always considered the statutes carefully and meticulously because of the great sacrifices of liberty that civil commitment laws require of

those committed. Texas has created a plainly punitive statute subjecting the mentally and behaviorally impaired to severe criminal penalties so that they may be placed back in prison for life.

2. Due Process

In *Addington v. Texas*, this Court stated, "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." 441 U.S. 418, 425 (1979). The Texas SVP Act provides for some due process protections, such as the right to counsel, the right to a jury trial, and the right to present evidence and examine witnesses. TEX. HEALTH & SAFETY CODE §§ 841.005, 841.061(d). Subjecting an individual to SVP commitment also subjects one to the new criminal penalties attached to commitment violations. The punitive nature of the statute requires the stronger protections of the criminal process, including the right to effective assistance of counsel, the right against self-incrimination, and the right to remain silent. As it stands, the statute violates procedural and substantive due process.

Petitioner presented evidence that he did not have a rational or factual understanding of the civil commitment proceedings. He could not assist his attorney in trial preparation. The main issue of a Texas SVP commitment proceeding is the present mental state of the respondent. When respondents are incompetent, they are unable to present a legitimate defense, denying them the opportunity to be heard in a meaningful way.

At trial, the State called Petitioner as a witness and forced him to testify about his past crimes and sexual habits. The significant liberty issues at stake in Texas

mandate a respondent in a commitment proceeding be allowed to exercise his Fifth Amendment right not to incriminate himself and to remain silent.

Procedural due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "Substantive due process prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted). The Texas SVP Act violates both procedural and substantive due process by subjecting incompetent individuals to criminal penalties and violating their right to remain silent and right to effective assistance of counsel.

B. Texas's punitive commitment scheme is part of a national trend toward unconstitutional punishment of sex offenders.

Seventeen states currently have civil commitment statutes targeting sexually violent persons or predators.[5]

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[5] ARIZ. REV. STAT. §§ 36-3701 to 3717; CAL. WELF. & INST. CODE §§ 6600 to 6609.3; FLA. STAT. ANN. §§ 394.910 to 394.931; 725 ILL. COMP. STAT. 207/1 to 207/99; IOWA CODE §§ 229A.1 to 229A.16; KAN. STAT. ANN. §§ 59-29a01 to 29a21; MASS. GEN. LAWS CH. 123A §§ 1 to 16; MINN. STAT. §§ 253B.185(1) to (7); MO. ANN. STAT. §§ 632.480 to 632.513; N.J. STAT. ANN. §§ 30:4-27.24 to 27.38; N.D. CENT. CODE §§ 25-03.3-01 to 03.3-23; 42 PA. CONS. STAT. §§ 6401 to 6409; S.C. CODE ANN. §§ 44-48-10 to 170; VA. CODE. ANN. §§ 37.1-70.1 to 70.19; WASH. REV. CODE §§ 71.09.010 to 71.09.902; WIS. STAT. §§ 98.01 to 98.12.

Nine more states are currently considering such legislation.[6] If left to stand, the Texas SVP Act presents an attractive but unconscionably punitive model for other states to follow that must not be permitted.

In recent months, both state and national governments have been under tremendous political pressure from the public to "crack down" on sex offenders. All 50 States require Sex Offender Registration and the Department of Justice has announced plans for a national sex offender registry.[7] Even so, high-profile crimes involving convicted sex offenders have triggered a popular outcry from the public and the media to take further action to take offenders off the streets.[8] States have responded by seeking harsher penalties for sex offenders both through

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[6] H.R. 43, 143RD Gen. Assem., Reg. Sess. (De. 2005); S. 0494, 2005 Leg., Reg. Sess. (In. 2005); H.R. Res. 6, 2005 Leg., Reg. Sess. (Ky. 2005); L.D. 1321, 122nd Leg., 1st Reg. Sess. (Me. 2005); L.B. 567, 99th Leg., Reg. Sess. (Ne. 2005); S. 42, 47th Leg., Reg. Sess. (N.M. 2005); A. 490, 2005 Leg., Reg. Sess. (N.Y. 2005); A. 2693, 2005 Leg., Reg. Sess. (N.Y. 2005); A. 3394, 2005 Leg., Reg. Sess. (N.Y. 2005); S. 3273, 2005 Leg., Reg. Sess. (N.Y. 2005); H.R. 227, 126th Gen. Assem., Reg. Sess. (Oh. 2005); H.R. 0108, 2005 Leg., Reg. Sess. (Vt. 2005).

[7] Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 1059 (2003); John Files, *National Sex Offender Database Is Announced*, N.Y. TIMES, May 21, 2005, at A10.

[8] David Scharfenberg, *Killing Makes a City Re-examine Itself*, NEW YORK TIMES, July 24, 2005, at 14WC p. 4; Betsy Z. Russell, *Senate Calls for National Sex Offender Registry; Craig Hopes Measures Can Prevent 'Tragedy Like the Groene Case'*, SPOKANE SPOKESMAN REVIEW, July 29, 2005, at B6; Marc Caputo, *Sex Offenders Face Tracking by Satellite; Death of Jessica Lunsford Has Led State Lawmakers to Pass Legislation Aimed at Using High-Tech Satellite Equipment to Track More than a Thousand Sex Offenders*, MIAMI HERALD, March 31, 2005, at A1.

longer criminal sentences and civil commitment.[9] States seeking to create or modify SVP commitment will likely use the Texas SVP Act as a model to further punish sex offenders who obtained favorable plea agreements or were successful with insanity defenses. It has the added benefit of civil discovery rules in which damaging admissions are readily obtained and easily used without the constraints of criminal process.

One problem with civil commitment is its high cost. The Texas model is also cheap, at least ten times less per offender than inpatient programs in other states.[10] Several states with inpatient civil commitment programs are struggling to continue their programs with rising costs from more and more offenders entering the system but few ever leaving.[11] When Missouri's legislature addressed the

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[9] Scharfenberg, *supra* note 5; Brad Knickerbocker, *States Step Up Efforts to Track Sex Offenders*, CHRISTIAN SCI. MONITOR, July 11, 2005, at USA 1; Bruce Alpert, *Congress Targets Sexual Predators: Officials Would Get Help Tracking Convicts*, TIMES-PICAYUNE (LA), May 3, 2005, at National 8; Terri Hallenbeck, *Douglas Unveils Civil Commitment Plan*, BURLINGTON FREE PRESS (VT), August 2, 2005, at 1B; Editorial, *Toughen Sex Offender Laws*, ARGUS LEADER (S.D.), July 27, 2005, at 7B; Patrick Orr, *Sex Offender Passed Pre-Parole Review; Fugitive Told Board He'd Keep Getting Treatment*, IDAHO STATESMAN, July 26, 2005, at Local 1; Kim Chandler, *Tougher Penalties OK'd for Sex Offenders*, BIRMINGHAM NEWS (AL), July 27, 2005, at News 1A; *Sex Offenders Kept From Storm Shelters*, N.Y. TIMES, Aug. 8, 2005, at A14.

[10] Washington State Institute for Public Policy, *Involuntary Commitment of Sexual Violent Predators: Comparing State Laws*, *at* http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf (last visited Aug. 17, 2005). (Texas projected cost: $0.5 million. 12 other states have projected costs of at least $5 million per year. California's projected cost is highest, at $45.5 million. Texas spends about $20 per client per day. Most other states spend more than $100 per day.)

[11] Virginia Young, *Keeping Sex Predators Locked Up Costs State; Some Lawmakers Seek Ways to Cut $8 Million Earmarked for Care*, ST. LOUIS POST-DISPATCH, April 12, 2005, at B2; Frank Green, *Senator: Fixing the System 'Is Going to Cost Us Money': Task Force Begins*

(Continued on following page)

issue this year, one Representative suggested an alternative to cost-cutting: "Why don't we just put these people back in prison?"[13] By following the Texas approach, states can do just that through civil commitment.

Although states "must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold," *Addington v. Texas*, 441 U.S. 418, 425 (1979) procedures must meet the constitutional minimums. The prevailing attitude towards sex offenders makes them particularly subject to unconstitutional liberty deprivations at the hands of legislatures. When enacting or modifying civil commitment programs, states must know the constitutional limits. The unusually punitive effects of the Texas SVP Act bring the statute well below constitutional minimums. Meaningful judicial review is imperative. If this Court does not grant review, legislatures will have carte blanche to conjure any punitive commitment measures they can imagine.

Looking at Ways to Improve State's Dealings with Sex Offenders, RICHMOND TIMES DISPATCH, June 8, 2005, at B-1; Hurst Laviana, *Growth Strains Predator Program; The Growing Number of Predators in the State's Sexual Predator Program Has Led to a 480 Percent Increase in Costs Since Fiscal 2001*, WICHITA EAGLE (KS), May 29, 2005, at A-1.

[13] Young, *supra*, note 9.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Page

In re Commitment of Michael Fisher, 164 S.W.3d 637 (Tex. 2005).....App. 1

Commitment of Michael Fisher v. State of Texas, 123 S.W.3d 828 (Tex. App. – Corpus Christi, 2003).....App. 38

Final Judgment and Order of Commitment.....App. 79

TEX. HEALTH & SAFETY CODE §§ 841.001-841.150.....App. 102